IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 15-15465

HAROLD SHEEHY,

Plaintiff-Appellant,

vs.

SANTA CLARA VALLEY TRANSPORTATION AUTHORITY,

Defendant-Appellee

On Appeal from an Order of the United States District Court
for the Northern District of California

The Honorable Paul S. Grewal, Magistrate Judge, Presiding
U.S. District Court Case No. 14-CV-1325 PSG

BRIEF OF APPELLANT

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I.

INTRODUCTION

This case concerns a question that the federal courts have repeatedly answered in the affirmative – must an employer compensate its employees for all time worked? The answer is an unqualified yes. "The employee is entitled to compensation for hours actually worked by him." *Skipper v. Superior Dairies, Inc.* (5th Cir. 1975) 512 F.2d 409, 419.

The Fair Labor Standards Act (hereafter "FLSA"), *29 U.S.C. § 201, et seq.*, generally requires payment of overtime at 1.5 times the regular rate for all hours worked after 40 in a week, *29 U.S.C. § 207(a)(2).* The Defendant-Appellee admits it is covered by FLSA (ER 664,667,668)[1], and as such it is required to pay overtime pay for work greater than 40 hours in a week. The U.S. Department of Labor has confirmed that "work" includes work "suffered or permitted." 29 CFR § 785.11 ("work not requested but suffered or permitted is work time."). An employer "who knows or should have known that an employee is or was working overtime must comply with the provisions of Section 207. An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation." *Forrester v. Roth's IGA* (9th Cir. 1981) 646 F.2d 413, 414.

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[1] In this brief, references to the Excerpts of Record will abbreviated "ER" followed by the page.

Plaintiff-Appellant Harold Sheehy is a light rail operator for Defendant-Appellee Santa Clara Valley Transportation Authority ("VTA" or "Employer"). Mr. Sheehy repeatedly arrived approximately 15 minutes late to the rail yard, at the end of his shift. He was normally due in about 11:55 p.m., but he arrived later. There is no dispute that during the time claimed as overtime, he was driving a train. He requested overtime pay (in writing) for that 15 minutes each day, and VTA was admittedly aware of Mr. Sheehy's requests. VTA claims that it denied Mr. Sheehy's overtime requests because Mr. Sheehy took an "unauthorized" break[2] earlier in the day.[3] However, Mr. Sheehy provided evidence, which the District Court apparently disregarded, that he did not need approval for such breaks, and that he had been taking them for years, with

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[2] Mr. Sheehy's break is described in the record as a "10-7B" break. A 10-7B break is a bathroom break. (ER 042).

[3] The question of whether Mr. Sheehy's break time was authorized or unauthorized is apparently a disputed fact. However, as this matter is before this Court after motions for summary judgment, the Court is required to draw inferences from the evidence in the light most favorable to the non-moving party. *Eastman Kodak Co. v. Image Technical Services, Inc.* (1992) 504 U.S. 451, 456. However, the "unauthorized break" was already paid for, as it occurred during time for which Mr. Sheehy was paid. This case concerns time spent driving the train after the so-called "unauthorized break." The "unauthorized break" occurred at about 11:15 p.m. (ER 662). He was paid until about 11:56 p.m.

VTA's knowledge, without negative consequences. The District Court ignored this dispute of fact, which constituted a triable issue of material fact. Summary judgment cannot be granted when such a dispute exists.

The District Court's decision also appears to rely in part on a claim that Mr. Sheehy did not offer an explanation for his 10-7B at Alum Rock station. Mr. Sheehy explained that he took a break at Alum Rock station in order to go to the bathroom without inconveniencing passengers. (ER 042-043). No passengers were inconvenienced because his carrying of passengers ended at Alum Rock station. He was then "deadheading" the train back to the yard. (ER 032). That deadhead trip normally takes about 33-45 minutes. (ER 042; 653). VTA was aware that Mr. Sheehy was taking a break, and Mr. Sheehy explained that VTA did not require him to seek approval from dispatch before taking it. (ER 042). Mr. Sheehy was under no obligation to explain his reasons for taking the break – he simply needed to go to the bathroom, and did so at a time that would not affect VTA's passengers. Any reliance by the District Court on this alleged lack of explanation constituted legal and factual error.

In a related arbitration, he testified on cross-examination as follows:

> Q: Now, was it ever your claim that you had a medical condition that required you to go the bathroom at the end of your run?
> A: Yeah. I have – I have prostate issues.
> Q: Okay. Now, did you provide any medical documents to your management?
> A: No, I did not, because I – it was in control.

Q: Okay. So that wasn't an issue?
A: Well, I would have to go the bathroom, yes.
Q: And that was what was causing the delay, was it not?
A: Well, no. I had to go to the bathroom. I don't – it's not a medical issue, I just had to go to the bathroom.
Q: Right. So had you not had to have gone to the bathroom, you could have made it back in time; isn't that right?
A: Probably not on time. I would probably be a little late. But, I –
Q: But, not 15 minutes late; correct?
A: That's correct.

(ER 75-76).

In addition, the District Court erroneously concluded that VTA's refusal to pay overtime was not willful within the meaning of the FLSA. VTA knew Mr. Sheehy was working beyond the end of his shift, and refused to pay him. VTA also admitted in arbitration testimony that its refusal to pay Mr. Sheehy was "willful."

VTA was aware for years that Mr. Sheehy was working past the end of his shift and refused to pay him for that time. VTA was aware of all of Mr. Sheehy's actions that led to this dispute, yet it never disciplined him or instructed him to act differently. An employer who knows that an employee is working overtime "cannot stand idly by and allow an employee to perform overtime work without proper compensation." *Forrester v. Roth's IGA* (9th Cir. 1981) 646 F.2d 413, 414.

VTA repeatedly denied Mr. Sheehy's requests for overtime, stating that Mr. Sheehy had "ample time" to return his light rail vehicle to the yard, or that he "deliberately delayed" his route. The District Court committed legal error in not considering these facts. An employer may not refuse to pay an employee because it determines that the employee could have worked faster. *Skipper v. Superior Dairies, Inc.* (5th Cir.1975) 512 F.2d 409, 419 ("The employee is entitled to compensation for hours actually worked by him. If another employee could or did perform the same duties in less time, a trier of the facts could, of course, conclude that such person was a faster worker than the complaining employee. Such fact would not detract from the binding effect of the testimony of the owners of the business and the testimony of the employee which established a longer day of work.").

The District Court erred and made errors of both fact and law in granting summary judgment to Defendant-Appellee. This Court should reverse the District Court.

II.

STATEMENT OF JURISDICTION

The federal courts have federal question subject-matter jurisdiction over this case, pursuant to 28 U.S.C. § 1331. Mr. Sheehy brings a claim under the Fair Labor Standards Act ("FLSA") 29 U.S.C. § 201 *et seq.*

On February 13, 2015, the District Court issued its judgment. (E.R. 003-011). This Court of Appeals has subject matter jurisdiction, as this appeal is from a final judgment pursuant to 28 U.S.C. § 1291. The Appellant timely filed a notice of appeal on March 12, 2015. (E.R. 001).

III.

STATEMENT OF THE ISSUE

Whether the District Court erred in granting summary judgment in favor of the Defendant-Appellee?

IV.

STATEMENT OF THE CASE

Plaintiff-Appellant Harold Sheehy is a light rail operator for Defendant-Appellee. VTA's refusal to pay Mr. Sheehy overtime led to the underlying action, alleging that VTA violated his rights under FLSA. Plaintiff filed his Complaint on March 21, 2014. (E.R. 666). On or about December 18, 2014, VTA filed a motion for summary judgment. A hearing was held on VTA's motion for summary judgment on January 27, 2015. (E.R. 012). On February 13, 2015, the District Court granted VTA's motion for summary judgment. (E.R. 004-011).

The District Court implicitly concluded that Mr. Sheehy was not entitled to overtime payment under the FLSA because he took an "unauthorized" break earlier in his shift, and that "unauthorized" break was credited against his overtime work. (ER 007-009). The District Court also concluded that the

VTA's actions were not "willful" within the meaning of the FLSA, and as such, the statute of limitation was two years rather than three years. (ER 010-011).

Judgment was entered in favor of Defendant on February 13, 2015. (E.R. 003). Plaintiff-Appellant timely filed this appeal on March 12, 2015. (E.R. 001).

V.

STANDARD OF REVIEW

An appellate court reviews *de novo* a district court's grant of summary judgment. *See, Arpin v. Santa Clara Valley Transp. Agency* (9th Cir. 2001) 261 F.3d 912, 919. Summary judgment shall be granted when, viewing the evidence in the light most favorable to the non-moving party, the court determines no genuine issues of material fact exist for trial. *Id.*

VI.

STATEMENT OF FACTS

Mr. Sheehy has been employed by VTA since 1981. (ER 042). He has been a light rail operator for twenty-three years. (ER 065-066). VTA is a local public entity which operates a public transportation system in and around Santa Clara County, California.

Light rail operators at VTA are represented for purposes of collective bargaining by Amalgamated Transit Union Local 265 ("Local 265" or "the Union.") (E.R. 095; 116). VTA and Local 265 are parties to a collective bargaining agreement, which contains the terms and conditions of a light rail operator's employment, including provisions regarding overtime. (E.R. 095; 097-0246).

Mr. Sheehy worked a shift which ended with him driving the light rail vehicle from Alum Rock station to the train yard. (ER 042). The light rail vehicle was not in revenue service (i.e. no passengers were present on the train) from Alum Rock station to the train yard. (ER 042). The trip from Alum Rock to the train yard was scheduled for about 33 minutes. (ER 653). But, according to Mr. Sheehy, took 40-45 minutes. (ER 042). Mr. Sheehy regularly arrived at the train yard (which represented the end of his shift) late, after his vehicle was scheduled to arrive. (ER 042). He was paid by VTA for all time before the scheduled end of his shift. (ER 042). His scheduled end time was 11:55, 11:56 or 11:57 p.m. (See ER 303-657). He regularly arrived at the yard approximately 14 to 16 minutes after he was scheduled to arrive. (ER 042). He submitted requests for overtime payment for those 14 to 16 minutes, copies of which are in the record. (ER 042; 303-657). After approximately March 21, 2011, his overtime requests were typically denied. (ER 303-637). A chart[4] summarizing

4 That chart was presented to the District Court as part of the opposition brief to VTA's motion for summary judgment. Briefs are not normally reproduced as part of the Excerpts of Record. That brief is available on PACER as District Court Docket #31.

Mr. Sheehy's requests is found on the next page. This chart summarizes the dates of requests, and whether they were denied or approved.

Month of Request	Number of Requests	Amount of Time Requested on a Particular Day	Number of Approved Requests	Number of Denied Requests
Jul 2010	7	10-15 minutes	7	0
Aug 2010	15	10-35 minutes	4	11
Sep 2010	16	15 minutes	0	16
Oct 2010	12	15-27 minutes	2	10
Nov 2010	19	12-30 minutes	4	15
Dec 2010	20	13-20 minutes	7	13
Jan 2011	22	14-30 minutes	21	1
Feb 2011	21	5-25 minutes	21	0
Mar 2011 before 3/21/11	8	14-22 minutes	8	0
Subtotal before 3/21/11	**140**		**74**	**66**
March 2011 after 3/21/11	6	14-20 minutes	0	6
Apr 2011	16	13-16 minutes	0	16
May 2011	20	13-17 minutes	0	20
Jun 2011	15	12-17 minutes	0	15
Jul 2011	11	14-19 minutes	0	10[5]
Aug 2011	19	13-18 minutes	0	19
Sep 2011	10	15 minutes	0	10
Oct 2011	3	14-15 minutes	0	3
Nov 2011	6	15 minutes	0	6
Dec 2011	8	15 minutes	0	8
Jan 2012	15	12-15 minutes	0	15
Feb 2012	14	13-15 minutes	0	14
Mar 2012	17	13-17 minutes	0	17
Apr 2012	11	14-19 minutes	0	11
May 2012	10	13-15 minutes	0	10[6]
Jun 2012	11	14-15 minutes	0	11
Jul 2012	13	14-15 minutes	0	13
Aug 2012	13	14-15 minutes	0	13
Sep 2012	10	13-15 minutes	0	10
Oct 2012	15	14-15 minutes	0	15
Nov 2012	17	14-40 minutes	1	16
Dec 2012	12	13-16 minutes	0	12[7]
Jan 2013	15	14-15 minutes	0	15
Feb 2013	16	12-15 minutes	0	16
Mar 2013	13	13-15 minutes	0	13
Subtotal after 3/21/11	**315**		**1**	**314**
~~**TOTAL**~~	~~**455**~~		**75**	**379**

[5] One date (7/19/11) was neither approved nor denied.

[6] An extra pay request was also made on 5/1/12, but was unrelated to late pull-in.

[7] This month appears after June 2012 in Exhibit A to Ms. Broock's declaration.

VTA often provided a reason for its denial of overtime. VTA's denials were written on the same form Mr. Sheehy submitted to request overtime. (ER 306-474). The chart[8] below shows the reasons VTA proffered:

Summary Statistics		
#	Reason for Denial - Beginning 3/21/2011	Count
1	Deliberate Delay	92
2	Ample Pull-In Time/Statement to Supervisor	74
3	Ample Pull-In Time/Deliberate Delay	65
4	No reason given	57
5	Pull-In Shortened 60 seconds -before change, train in on time	8
6	excessive time	6
7	10-7B @ Alum Rock - Deliberate Delay/Ample Time	5
8	excessive amount of time	1
9	excessive request	1
10	delay due to personal reasons	1
11	unreasonable request	1
12	Statement to supervisor	1
13	Walk Across Platform does not take 17 minutes	1
14	Ample Pull-In Time	1
	Total	**314**

As shown above, the overwhelming reason VTA used for its denial of overtime was that it concluded Mr. Sheehy took too long in completing his shift.[9] VTA never stated that it was denying Mr. Sheehy's overtime because he took an "unauthorized" break. As described in detail below, an employer is not permitted to refuse to pay an employee who it determines works too slowly.

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[8] This chart was also before the District Court as part of the opposition brief. See District Court Docket #31.

[9] "Deliberate delay" was cited about 157 times. (See chart items #1 and #3). "Ample time" allowed for the pull-in was cited about 139 times. (See chart (continued…)

Before leaving Alum Rock station to return the train to the yard, Mr. Sheehy took a bathroom break. (ER 042). In a perplexing footnote, the District Court stated that despite "diligent efforts" it could not determine what a 10-7B break was "beyond a personal break or a bathroom break," and therefore would treat it as a "standard break." (ER 009)[10]. The record is clear. A 10-7B break is a bathroom break. (ER 042).

VTA became aware that Mr. Sheehy was taking a bathroom break at Alum Rock station in September 2010. (ER 659). John Cross, a VTA Superintendent, investigated and acknowledged that Mr. Sheehy was taking a 10-7B break at Alum Rock station. (ER 659-660). Mr. Cross also asserts that Mr. Sheehy told him that he had previously arrived early at the rail yard. (ER 660). Mr. Sheehy disputes this assertion. At arbitration, Mr. Sheehy was asked

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items #2 and #3). Often a statement made to a supervisor was also cited, but there appears to be only one such statement in the record. (ER 659-662).

[10] It is unclear what the District Court means by "standard break." The FLSA and its regulations do not define a "standard break." FLSA regulations do do provide that rest breaks constitute compensable time worked, and that *bona fide* meal breaks are not necessarily time worked (See 29 CFR Section 785.18 & 785.19) but there does not appear to be any legal significance to defining a break as a "standard break." There is a legal significance to defining a break as a bathroom break, as bathroom breaks constitute compensable time worked under 29 CFR Section 785.18.

about his conversation with Mr. Cross by VTA counsel during cross-examination. (ER 073-074). The testimony was as follows:

> Q. Okay. On one of those nights when you were at Alum Rock, you were approached by Supervisor John Cross, isn't that right?
> A. That's correct.
> Q. And on that night, you were in the bathroom for about 12 minutes. Do you recall that?
> A. No, I do not. Not 12 minutes.
> Q. But when he approached you, he asked you why you were submitting all these overtime requests - - -
> A. That's correct.
> Q. ---right?
> You indicated to him that it was because the schedule had been shortened; is that right?
> A. Somewhat, yes.
> Q. Okay. And you also indicated to him that before the schedule was shortened, you were coming back early, did you not?
> A. I did not -- I don't believe I said that.

(ER 073-074).

Mr. Sheehy further discussed the conversation with Mr. Cross later in the arbitration, when examined by the Union's attorney:

> Q. (By MR. FLYNN): Can you tell us as best you can recall, what Mr. Cross said and what you said.
> A. Yeah. He – as best that I can remember, he asked me – they said they sent him out to find out why I'm constantly running late, and I told them – I says, "I don't know what they're doing. They've cut my schedule, but it still means I have to still go to the bathroom," I think, is what I recall saying.
> Q. And do you recall, did he say anything?
> A. He did not say much, no. I just told him that , "I don't know what they're doing or why they're doing it, but it doesn't mean that I can't go to the bathroom. I still have to go to the bathroom.

(ER 079).

Thus, the District Court's assertion that Mr. Sheehy was consistently early (ER 005) is contradicted by conflicting testimony.[11] As Mr. Sheehy stated in his declaration dated December 31, 2014: "Prior to July 2010, I was often late in arrival at the rail yard but rarely requested overtime if I was late." (ER 042).

He also discussed it at the arbitration when questioned by Mr. Ahn, VTA's attorney. He testified as follows:

> Q. Isn't it correct that you -- prior to July of 2010, you had no problems coming back to the yard within the scheduled time allotted; isn't that right?
> A. I was late, yes. Yes.
> Q. You were –
> A. You mean pulling into the yard?
> Q. Pulling into the yard, prior to the schedule change, you didn't have any trouble getting back on time, did you..
> A. I don't think I pulled in on time, no. I think I've always been late.
> Q. Did you file any overtime requests for those late –
> A. No, I did not. No, I did not. No, Because it was a matter of just a few minutes and I –I just didn't do it.

(ER 072-073).

VTA is correct that he did not request overtime pay for such late arrivals. But that does not mean that he did not get in late often. Despite learning about the break, VTA never forbid Mr. Sheehy from taking a 10-7B break at Alum Rock station, or imposed any discipline on Mr. Sheehy for his bathroom break or late arrival at the yard. The District Court described Mr. Sheehy's bathroom break as "unauthorized", yet the record also shows that Mr. Sheehy routinely took such breaks for years, with VTA's knowledge, and without need for approval from VTA. (ER 659-662; 042). The President of Local 265 further confirmed that she had taken similar breaks without the need for approval from VTA, and was paid overtime for her time. She testified as follows at the related arbitration:

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[11] Moreover, the District Court's discussion of whether Mr. Sheehy was early or late in arriving at Alum Rock in 2010 is irrelevant to its determination of whether the time he incurred in 2011-2013 was compensable. The timing of Mr. Sheehy's arrivals in 2010 is outside the statute of limitations in this case.

> Q. [BY MR. AHN] Have you known any operator to request a 15-minute overtime request for a 10-7B every single day of his run, for more than two years?
> A. I did it.
> Q. Every single day for more than two years?
> A. I did it.
> Q. And did you receive an approval for those overtime requests –
> A. Yes, I did.
> Q. – every single day for two years?
> A. Yes, I did.

(ER 084).

The District Court erred when it noted Mr. Sheehy's schedule at footnote 23 (ER 007-008), insofar as it considered all time not listed in the schedule as driving a train as a "break."[12] The District Court totaled that "break" time as 1 hour and 37 minutes per day. But a portion of that time was "schedule recovery" time.

For example, say Mr. Sheehy's train is stuck in traffic[13] or otherwise delayed. His schedule is "recovered" by his leaving on time. He only gets the full time listed for a "break" if his train arrives on time.[14] Leaving early from any station is also a problem as train schedule are relied upon by passengers. The collective bargaining agreement (in compliance with California IWC Wage Order 9-2001) discusses this in some detail in Part B, Section 14:

> 14.1 Operator Meal/Rest Periods and Layover/Recovery Time
> Layover/Recovery Time is categorically distinct time from Operator Meal/Rest Periods. Typically, Layover/Recovery Time is used by VTA to adjust the running time of the schedules in accordance with route lengths and headways and to accommodate various factors that may influence the ability to meet published schedules. Operator Meal/Rest Periods may be taken away from the vehicle and is set aside for the use of the Operator for rest, meals, or other personal needs.
>
> In general, Operator Meal/Rest Periods will be taken during Layover/Recovery. However, both time periods must be

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[12] The District Court did not list the scheduled end-time. It was 11:55, 11:56 or 11:57 p.m. during the relevant period. See, ER 303-637.

[13] VTA's light rail trains generally run in a right of way in the middle of streets. As such, they can be affected by traffic.

[14] In his declaration, Mr. Sheehy notes that his longest break was 30 minutes but "As I was often late in arriving at Santa Theresa station, I rarely received a full 30 minute break." (ER 043).

> programmed into the schedules or work period. All Meal/Rest periods where applicable are paid and computed as time worked. The meal/rest period time for straight runs or straight full time work periods shall have the time distributed as evenly as possible throughout the work day.
>
> 14.2 Rail Operator Meal/Rest Periods
> Rail Operators shall be entitled to at least fifty minutes total meal/rest time for straight runs or straight full time work periods.

(ER 186)

Under the agreement, Mr. Sheehy is entitled to 50 paid minutes "distributed as evenly as possible throughout the work day." His break time is "categorically distinct" from recovery time. He, of course, did not make the schedule. He was required to leave at particular times, and he did so.

VII.

SUMMARY OF ARGUMENT

It is undisputed that Mr. Sheehy drove a light rail vehicle for VTA past the end of his shift, and was not paid for that time, which was approximately 15 minutes. Under long standing precedent, an employee must be paid for all time worked. Here, VTA knew Mr. Sheehy was working, continued to permit him to work and arrive late, and yet refused to pay him.

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VIII. ARGUMENT

A. Appellant is Entitled to Overtime Pay for All Time Spent Working for VTA In Addition to The Time He Was Already Paid.

There is little dispute that Mr. Sheehy drove a train and was not paid for the time after his schedule called for him to be paid. VTA was aware he brought his train in late every night. He submitted written “Extra Pay Requests,” asking for overtime. (ER 303-637). These requests were often time-stamped by VTA, and were routinely denied by VTA. VTA cannot credibly claim that it was unaware that Mr. Sheehy was working beyond the end of his shift – he informed them of this every night, and they repeatedly denied his requests for payment.

The District Court, in its grant of summary judgment, appears to focus on the issue of Mr. Sheehy taking an unauthorized break earlier in the day, and allowing VTA to credit that time against Mr. Sheehy’s overtime at the end of his shift. The District Court made both a factual and a legal error in reaching that conclusion.

The District Court made a factual error when it asserted that Mr. Sheehy’s earlier break time was unauthorized. The record is clear that Mr. Sheehy provided a declaration stating that he was permitted to take a break at Alum Rock station without calling dispatch. (ER 042). He was not required to obtain approval prior to taking the break. (ER 042). Union President Diane Hermone testified at arbitration that she routinely came in late due to a bathroom break and was paid for her time. (ER 084). While VTA may have supplied declarations claiming otherwise, in evaluating a motion for summary judgment, the facts must be viewed in a light most favorable to the non-moving party. *Eastman Kodak Co. v. Image Technical Services, Inc.* (1992) 504 U.S. 451, 456. Therefore, for purposes of evaluating the motion for summary judgment Mr. Sheehy's declaration must thus be taken as true. Moreover, this dispute in whether the break was authorized or unauthorized demonstrates a bona fide material dispute of fact which would operate to defeat summary judgment. With such facts presented to it, the District Court never should have granted summary judgment.

Furthermore, Mr. Sheehy was paid for the time he was on his bathroom break. He does not seek compensation for that time, as he was already paid for that time. Rather, he seeks compensation for time was demonstrably working – the unpaid time when he was driving the light rail vehicle back to the yard. He was undisputedly never compensated for that time. The instant action seeks pay for a time he was working, i.e., driving a train. VTA wanted that train taken to the yard. Under the FLSA, he is entitled to be compensated for all the time he did that work. *Forrester v. Roth's IGA* (9th Cir. 1981) 646 F.2d 413, 414.

In addition, the District Court also committed legal error in that it appears to grant VTA a credit for Mr. Sheehy's *already compensated bathroom break* at

Alum Rock station. FLSA regulations provide that an employer may receive a credit against overtime for *bona fide* meal periods.[15] 29 CFR Section 785.19. However, the District Court did not award VTA a meal period credit in this case. Rather, the District Court appears to have implicitly granted VTA a credit against overtime for the time Mr. Sheehy spent taking his bathroom break at Alum Rock station. But Mr. Sheehy was already paid for the time incurred by that bathroom break. The District Court fails to point to any authority that allows an employer to refuse to pay an employee for time that was undisputedly spent working.

VTA has the ability to discipline rail operators for taking inappropriate or unauthorized breaks, something the Union has acknowledged. (ER 095). If VTA was displeased with Mr. Sheehy's behavior, VTA should have disciplined him[16], but a denial of overtime pay is not proper discipline. *See, Martin v. Waldbaum* (E.D.N.Y. 1992) 123 Lab. Cas. (CCH) P35, 716 ("Even to the extent that an individual employee arguably may have been abusive of break time, efficiency and common sense would dictate that management's attention to the situation at its incipience would provide the proper remedy.")

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[15] However, in this case, meal period time is treated by the parties as time worked for rail operators on straight shifts, as the collective bargaining agreement includes such provisions. (ER 186). Such provisions are permissible under the FLSA. 29 CFR Section 778.320; *O'Brien v. Town of Agawam* (D. Mass. 2003) 440 F. Supp. 2d 3, 22.

[16] Under the collective bargaining agreement which covers Mr. Sheehy, VTA is required to give the employee and the Union notice of discipline within (continued…)

As Chart II notes, the overtime requests were often denied for the reason that "Ample Pull-In Time" was given, or that VTA believed there was a "deliberate delay."[17] Determining that another operator could have done it quicker just does not answer the question of how long it took Mr. Sheehy. As in *Skipper v. Superior Dairies, Inc.* it is unimportant that another worker could do the job faster. As the *Skipper* court notes, "This has little bearing on the case." *Skipper, supra, 512 F.2d* at *419*.

Supposedly, Mr. Cross saw the plaintiff taking an "unauthorized break" on September 3, 2010 (ER 659-660) but VTA took no action. VTA could have initiated discipline, or conducted further investigation, but it did neither. It could have ordered him not to take a break at Alum Rock. VTA's claim that Mr. Sheehy's break was "unauthorized" four years after it occurred, when no discipline took place, is simply unbelievable. Indeed, Mr. Cross' email in 2010 does not describe the 10-7B break as unauthorized, or even recommend that VTA instruct Mr. Sheehy to not take a bathroom break. (ER 662).

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30 days from knowledge of occurrence. (ER 149). VTA never disciplined Mr. Sheehy during the years it was aware he took a bathroom break at Alum Rock.

[17] Of course, VTA did not list an earlier "unauthorized" bathroom break as a reason why it denied Mr. Sheehy's overtime.

The District Court appeared to have correctly articulated the rule regarding Mr. Sheehy's eligibility for overtime pay. It stated:

> The FLSA generally requires overtime pay at one and a half times the regular rate for all hours after 40 in a week. In order to earn compensable overtime, "[f]irst, each activity must constitute work. That is, it must be undertaken for the benefit of the employer and controlled or required by the employer . . . Second, Plaintiff must have been employed (suffered or permitted) to do the work, and the employer knew or should have known they were working. Finally the hours of work performed must be actually, rather than theoretically, compensable." Expressed another way, "work or employment as those words are commonly used means physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

(ER 004-005).

Using that standard, Mr. Sheehy should have prevailed. He drove a train for the benefit of VTA, and VTA knew what he was doing. Also, driving a train was exertion controlled or required by VTA and pursued for its benefit.

B. Plaintiff's Break Time Was Work Within the Meaning of the FLSA

The unpaid time at issue in this case is the unpaid 14-16 minutes that Mr. Sheehy spent driving the train from Alum Rock station to the rail yard. The trip back to the yard took longer than 14-16 minutes, but only this part was unpaid. While the District Court concludes that Mr. Sheehy is seeking to be paid for an unauthorized break taken at the end of his shift (ER 007)[18], this is not the case. As discussed above, the break was not "unauthorized" Mr. Sheehy was permitted to take a "10-7B" bathroom break at the Alum Rock station, before he began to drive the train back to the rail yard. (ER 042).

The District Court described the time at issue as not "an integral and indispensable part of the principal activities" of VTA. (ER 007). This is simply incorrect. The time in question is the time Sheehy spent driving a VTA train back to the rail yard. Driving a train is unquestionably an integral and indispensable part of VTA's principal activity of operating a public transportation system. Even if the District Court means to refer to the time Mr. Sheehy was on a break, that time was compensable.

It is long-established that rest periods (of 5 to 20 minutes) are compensable time under the FLSA. 29 CFR § 785.18 ("Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry . . . They must be counted as hours worked."). This long-established legal principle is also found in the text of the collective bargaining agreement ("CBA") between VTA and Mr. Sheehy's union, ATU Local 265. Part B,

[18] The bathroom break at Alum Rock station was not at the end of Mr. Sheehy's shift. He still had about 45 minutes of work remaining, in order to return the train to the yard and perform necessary inspections.

Section 14 of the CBA states "All Meal/Rest periods where applicable are paid and computed as time worked." (ER 186).

The District Court cites the Department of Labor's Operations Handbook[19] for the proposition that "an unauthorized extension[20] of a rest break is not counted as time worked." (ER 007). However, the District Court failed to analyze all of the factors present in the Handbook provision it relies upon. That provision (Chapter 31, Section 31a01)[21], states:

> (a) Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid as working time. They must be counted as hours worked.
>
> [. . .]
>
> (c) Unauthorized extensions of authorized employer breaks are not counted as hours worked for an employee when the employer has expressly and unambiguously communicated to the employee that:

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19 It is unclear if the Operations Handbook is valid authority here. The Operations Handbook is an internal DoL publication provided to its field agents. Unlike the FLSA regulations promulgated by the DoL (such as those cited above), the statements of Operations Handbook do not have the force of law. The District Court never addresses this issue.

20 The break at Alum Rock was not an "extension" of a prior break. The District correctly notes that Mr. Sheehy's last scheduled break was about 1 to 2 hours earlier, from approximately 9:27 p.m. to 9:57 p.m. See ER 008, n.23.

21 The Handbook is not in the record. Plaintiff-Appellant relies upon the version of the Operations Handbook available at http://www.dol.gov/whd/FOH/FOH_Ch31.pdf.

(1) The authorized break may only last for a specific length of time;
(2) Any extension of such break is contrary to the employer's rules; and
(3) Any extension of such a break will be punished.

There is insufficient evidence in the record to support the requirements of subsection (c). The District Court failed to identify any evidence of an express and unambiguous communication to Mr. Sheehy that he could not take a bathroom break at Alum Rock station. Nor did the District Court identify any communication by VTA showing that taking such breaks was contrary to its rules. Indeed, Mr. Sheehy regularly took a bathroom break at Alum Rock station. (ER 042-043). VTA knew that Mr. Sheehy was taking a break (ER 659-662), and did not forbid him to do so, or discipline him, over a period of several years.[22] In addition, the District Court did not conclude that "extending" a break at Alum Rock station would result in punishment, as it points to no VTA rule stating that rail operators will be punished for taking "unauthorized" bathroom breaks. Mr. Sheehy took bathroom breaks at Alum Rock station, with VTA's knowledge, without punishment, for years.

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[22] Mr. Sheehy regularly reminded VTA that he was taking a 10-7B bathroom break at Alum Rock station, as his overtime requests frequently mentioned it. (See, e.g., ER 600).

Any reliance by the District Court on an alleged written rule by VTA was erroneous, and grounds for reversal of summary judgment. Whatever written rule VTA claims existed was superseded by VTA's own practices. VTA cannot claim a rule existed without also providing evidence that it was enforced, and there is no evidence in the record that VTA enforced its claimed rule regarding contacting dispatch before taking breaks. Indeed, Mr. Sheehy provided a declaration stating that he was not obligated to call dispatch (or anyone else) before taking a bathroom break. (ER 033; 042). Furthermore, the alleged rule states that a rail operator must call the Operations Control Center if tardy by more than two minutes for a scheduled departure. (ER 038). However, Mr. Sheehy's departure from Alum Rock station was not a scheduled departure. (ER 032).[23] The alleged VTA rule thus had no application in this instance.

Finally, the collective bargaining agreement specifies that break time is treated as time worked. (ER 186). The District Court was in error when it concluded that time incurred by Mr. Sheehy was non-compensable, as that time was deemed by VTA to be compensable. Such deemed time is treated as hours worked under the FLSA. See, 29 CFR § 778.320. The District Court was not free to ignore the consequences of the collective bargaining agreement.

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[23] VTA verbally objected at the hearing to Mr. Sheehy's second declaration as untimely. (ER 021). The District Court did not rule on the objection.

The CBA states that overtime includes paid time. (ER 182). Union President Diana Hermone has confirmed that rest period time is included in the calculation of overtime for operators. (ER 095). Mr. Sheehy has confirmed that he was paid overtime for any time beyond the scheduled eight hours a day. In the arbitration hearing, Mr. Sheehy testified:

Q. And anything over eight is paid at time-and-a-half?

A. Yes.

(ER 068).

C. VTA's Refusal to Pay Plaintiff for Time Worked Was Willful, and Thus a Three-Year Statute of Limitations Applies.

The statute of limitations that applies was added to the FLSA by the "Portal to Portal" Act of 1947, 29 U.S.C. §§ 251, *et seq.* The statute of limitations is contained in 29 U.S.C. § 255. The current statute of limitations was last amended in 1966. In *McLaughlin v. Richland Shoe Co.* (1988) 486 U.S. 128, the court defines the "willfulness" standard.

> The standard of willfulness that was adopted in Thurston—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act.

Id. at 133, referencing *Thurston v. Trans World Airlines, Inc.* (1985) 369 U.S. 111.

Here, at a minimum, there is a dispute of fact concerning "willfulness." VTA knew it was covered by FLSA. It knew Mr. Sheehy was claiming overtime for driving a train. Its defense (based on Mr. Sheehy's activities earlier in the workday) is not reasonable. It denied the overtime claims, in part, because "ample time" was provided. That cannot justify "suffering or permitting" Mr. Sheehy to work. VTA never asserted that it did not know the FLSA standard for paying for all time worked. Finally, Ms. Broock admitted that the denials were willful. She testified as follows at arbitration[24]:

> Q. And VTA knew, from his extra pay request, that he was requesting overtime.
>
> A. That's correct.
>
> Q. And VTA *willfully* chose not to pay it; correct?
>
> A. Correct.

(ER 058, emphasis added)

The District Court relied on *Baker v. DARA II, Inc.* (D. Ariz. 2008) 2008 U.S. Dist. LEXIS 8741, *16-17 for the proposition that Ms. Broock's testimony was not binding for purposes of summary judgment. (ER 010). The court in *Baker* concluded that layperson testimony concerning "willfulness" was not

[24] The District Court refers to this as deposition testimony. (ER 010). That is incorrect. The testimony of Ms. Broock (as well as many other witnesses in this case) comes from an arbitration. (ER 044-045).

binding for summary judgment purposes. However, the *Baker* court also stated "While Plaintiff's deposition statements may be admissions at time of trial, they are not binding for purposes of Defendants' cross motion for summary judgment." *Id.* at 17. As in *Baker*, the layperson's statement about "willfulness" should be decided by the trier of fact.

The District Court appears to acknowledge that the Ninth Circuit considers the question of willfulness a mixed question of law and fact. (ER 009). *Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 908, *affm'd IBP, Inc. v. Alvarez* (2005) 546 U.S. 21. Given VTA's knowledge of Mr. Sheehy's work, its express refusal to pay him overtime, and Ms. Broock's arbitration testimony, it was error for the District Court to rule that VTA's actions were not willful as a matter of law.

IX.

CONCLUSION

Based on the foregoing, Plaintiff-Appellant respectfully requests that the judgment of the district court be vacated, that this Court deny Defendant-Appellee's motion for summary judgment, and that the matter be remanded for further proceedings.

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Dated June 22, 2015 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32(a)(7)(C) and CIRCUIT RULE 32-1

Pursuant to F.R.A.P. Rule 32(a)(7)(C) and the Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 7,239 words.

Respectfully submitted,

Dated: June 22, 2015

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STATEMENT OF RELATED CASE(S)

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant is unaware of any related case pending before this Court.

Respectfully submitted,

Dated: June 22, 2015

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PROOF OF SERVICE BY E-FILING

I, the undersigned, declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action. My business address is 369 Pine Street, Suite 800, San Francisco, California 94104. On June 22, 2015 I served the within by electronic filing:

BRIEF OF APPELLANT

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 22, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Benjamin Lunch
Benjamin Lunch